SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**October Term, 1968**

**No. 461**

FREIDA SUFFIN,

*Petitioner,*

*v.*

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA COMPANY and NORFOLK AND WESTERN RAILWAY COMPANY,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF RESPONDENT NORFOLK AND WESTERN RAILWAY COMPANY

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## BRIEF OF RESPONDENT NORFOLK AND WESTERN RAILWAY COMPANY

### Question Presented

Whether a single judge District Court has jurisdiction to review the fairness of the terms of an issuance of securities by a railroad after the Interstate Commerce Commission (the "ICC") has approved such terms.

## Statement

On June 24, 1964, the Interstate Commerce Commission authorized a unification of the Norfolk and Western Railway System by approving the merger into the Norfolk and Western Railway Company (the "N&W") of the New York, Chicago and St. Louis Railroad Company, its purchase of the Sandusky line of the Connecting Railway Company and its acquisition of two small roads. *Norfolk and W. Ry. and New York, C. and St. L. R. Merger,* 324 I.C.C. 1 (1964) ("Merger" decision; 6a*).

As a condition of its approval, the ICC called upon The Pennsylvania Railroad Company and The Pennsylvania Company (collectively the "Pennsylvania"), to divest themselves of their holdings of N&W stock, then amounting to approximately one-third of the amount outstanding, within ten years from the date of consummation of the transactions approved therein and stated:

> "*We shall retain jurisdiction for the purpose, among others, of insuring an orderly divestiture within the 10-year period* or such other period as may hereafter be found necessary for the satisfactory accomplishment thereof." (Emphasis added.) 324 I.C.C. at 48.

In addition, the ICC stated:

> "As an integral part of the divestiture, all management in relationships between the Pennsylvania and Norfolk and Western systems shall be severed within sixty days of the effective date of this order. The

* Numbers in parentheses refer to the Appendix in the Court below; when prefaced by "App.", they refer to the Appendix to the pending Petition for a Writ of Certiorari.

> Pennsylvania is to relinquish or cause to be relinquished any voice which it or its subsidiaries or affiliates may have in the control, operation or management of the Norfolk and Western, and is to cause the resignation from the Board of Directors of the Norfolk and Western any director common or otherwise, representing thereon the interests of the Pennsylvania, as well as the resignation of any officer of the Norfolk and Western elected to represent such interests." 324 I.C.C. at 48.

In furtherance of the ICC divestiture requirement that was accepted by the Pennsylvania, the N&W and the Pennsylvania entered into a memorandum of agreement, dated September 22, 1964, providing that the Pennsylvania would, over a period of ten years, exchange 800,000 shares of N&W common stock for N&W 4⅝ per cent fifteen year convertible subordinated debentures, convertible under certain terms and conditions into N&W stock, by persons other than the Pennsylvania, at a rate of $13,000 principal amount of debentures for each 100 shares of common stock.

While admitting in her complaint that the three "Pennsylvania" directors on the N&W Board (Symes, Bevan and Saunders) resigned on September 16, 1964—a week before the memorandum of agreement (5a)—the petitioner, an N&W stockholder, brought her action derivatively for the alleged benefit of N&W, challenging the memorandum of agreement on the ground that its terms were arrived at in other than arm's-length bargaining because of her claim that the Pennsylvania "dominated and controlled" the N&W (6a).

On or about April 2, 1965, N&W distributed its proxy statement to its stockholders, including petitioner, inform-

ing them that a debenture-for-stock purchase agreement was being prepared as part of the divestiture necessary to accomplish the merger and described the principal terms thereof (16a-18a).

A definitive Exchange Agreement, pursuant to the September 22, 1964 memorandum, was entered into as of December 31, 1965. 328 I.C.C. at 885.

On February 28, 1966, N&W, pursuant to the requirement of Section 20a of the Interstate Commerce Act, applied to the ICC for authority to issue the debentures in exchange for its stock under the terms of the Exchange Agreement. Shortly thereafter and on or about March 23, 1966, N&W via its proxy statement informed its stockholders, including petitioner, of the pending Section 20a application (19a).

On April 13, 1966, the ICC rendered its report and order granting such authority (*Norfolk and Western Ry. Company Securities,* 328 I.C.C. 884 (1966) ("Securities" decision)), wherein it stated:

> "In *Norfolk & W. Ry. Co. and New York, C. and St. L. R. Co. Merger,* 324 I.C.C. 1, the Commission conditioned its approval of the transactions proposed therein and in related proceedings upon, among other things, divestiture by the Pennsylvania Railroad and the Pennsylvania Company, and their subsidiaries and affiliates, of their present and future stockholdings in the applicant within 10 years from the date of consummation thereof. The conditions were accepted and the transactions consummated on October 16, 1964. *As part of a program of divestiture to comply with these conditions,* the Pennsylvania Railroad Company, the

Pennsylvania Company, and the applicant entered into an exchange agreement dated as of December 31, 1965, under which Pennsylvania Company would, within the prescribed 10-year period, exchange 800,000 shares of its Norfolk & Western common stock for $104,000,000 principal amount of applicant's 15-year 4⅝-percent serial subordinated convertible debentures at an exchange rate of $13,000 principal amount of debentures for each 100 shares of common stock." (Emphasis added.) 328 I.C.C. at 885.

As the Court of Appeals stated (App. 5a):

"Even though the complaint alleges that PRR dominated and controlled N&W through stock ownership and an interlocking directorship at the time of the initial 'memorandum of agreement' setting the terms of the challenged exchange (September 22, 1964), the complaint also concedes that all PRR officers and directors had resigned from the N&W Board by September 16, 1964. The record further shows that on October 13, 1964, PRR had deposited all its shares of N&W in three, I.C.C.-approved, independent voting trusts pursuant to the Interstate Commerce Commission (I.C.C.) 'merger' decision of June 24, 1964, which established certain preconditions for a railroad merger, 324 I.C.C. 1, 48-49 (1964). The transaction was approved again by the N&W directors on September 28, 1965 (328 I.C.C. at 885) and the agreement (dated as of December 31, 1965) was submitted for I.C.C. approval on February 28, 1966. The 'securities' decision of April 13, 1966, approving the contemplated exchange, 328 I.C.C. 884 (1966), makes specific reference to the earlier merger decision and to its required PRR divestiture of N&W stock, and we note, as did the District Court, that in its 'merger' decision the I.C.C. explicitly 'retain[ed] jurisdiction for the pur-

pose, among others, of insuring an orderly divestiture within the 10-year period. * * *' " 324 I.C.C. at 48.

Respondents moved to dismiss the complaint on substantially the same grounds, namely, that the District Court lacked jurisdiction of the subject matter of the claim; that the ICC possessed exclusive jurisdiction and issued orders which petitioner herein, in effect, was attempting to review; that petitioner failed to comply with the requirements of Section 1398, and chapter 157, of Title 28 of the United States Code, relating to the enforcement and review of the ICC orders, resulting in an improper tribunal, improper venue and a failure to join the United States as a party (12a-15a).

The District Court granted the motion and the Court of Appeals for the Third Circuit affirmed.

## ARGUMENT

### POINT I

**The Court of Appeals' decision follows applicable decisions.**

Much of petitioner's argument is devoted to an issue that was not essential to the decision of either the Court of Appeals or the District Court, namely, the scope of ICC review where only Section 20a is involved. As the Court of Appeals stated:

> "The appellant's statutory argument must be rejected in view of the inter-relationship between the * * * I..C.C. 'merger' and later 'securities' decisions * * *." *Suffin* v. *Pennsylvania R.R.*, 396 F.2d 75, 77 (3d Cir. 1968). (App. 6a-7a; see also, App. 5a n. 1).

Both courts recognized the relationship between the Merger and Securities proceedings and treated the securities as having been issued in a merger context. Petitioner concedes that in a merger context the ICC passes upon what she describes as "private rights" (Petition, 13). She has little alternative in the face of *Denver & Rio Grande W. R.R.* v. *United States,* 387 U. S. 485 (1967) and *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

Petitioner argues that the District Court and Court of Appeals should not have concluded as they did that the Merger and Securities decisions were interrelated (Petition, 7-9). We submit that such conclusion should not be reviewed by this Court under the considerations governing certiorari set forth in Rule 19(b) of the Supreme Court Rules. Certainly, that conclusion is unique to the facts and circumstances of this case and where two courts have already passed upon it, review thereof is unjustified.

The conclusion that the two proceedings were interrelated was proper. The portions of the Merger and Securities decisions set forth in the Statement, *infra,* not only demonstrate their relationship but show that one was anticipated in, and virtually flowed from, the other.

In its Merger decision the ICC anticipated that:

> "As a partial alternative to a secondary distribution of Norfolk & Western stock, it may well be that the Pennsylvania and the Norfolk & Western could reach an agreement providing for annual sales to Norfolk & Western of shares of its stock over a period of years." 324 I.C.C. at 41.

Petitioner's simplistic approach to finances interprets that language as limiting consideration to cash sales. No such limitation is indicated, nor can it be seriously contended that the ICC intended one.

The Merger decision is replete with considerations in depth by the ICC of possible ways and means for the Pennsylvania to dispose of its N&W stock with a minimum impact on its market price, including consideration of the N&W's cash position.

The Securities decision establishes that the ICC did explore in depth the terms and conditions of the actual sale, including whether it was in the public interest as well as in the best interest of N&W and its security holders.

Contrary to the petitioner's contention that the ICC did not consider the merits of the transaction insofar as N&W and its stockholders were concerned, the ICC in its Securities decision expressly stated that the transaction would:

> "* * * minimize the impact of Pennsylvania Company's divestiture program on the market price of applicant's common stock and contribute to the maintenance of its financial and credit standing, all of which is in the public interest *as well as in the best interest of the applicant and its security holders.*" (Emphasis added.) 328 I.C.C. at 891.

Furthermore, even though neither the District Court nor the Court of Appeals considered it necessary to reach the question, the dichotomy between Sections 5 and 20a, argued by the petitioner, is without support.

In the *Denver* case, *supra,* this Court rejected a similar attempt to fragment the Interstate Commerce Act. Mr. Justice Brennan, in delivering the opinion of this Court, stated:

> "* * * [T]he foundations of the ICC's obligation under §5 are largely applicable to §20a as well. Section 20a, like §5, must after all be read in the context of overall ICC responsibilities." 387 U.S. at 493.

Confronted with this clear pronouncement that Section 5, in effect, does apply, petitioner would engraft a limitation on that holding in *Denver* that only anticompetitive effects can be considered along with fiscal manipulation questions under Section 20a. However, this Court in *Denver* said exactly the contrary in holding that "*all* important consequences *including* anticompetitive effects," 387 U.S. at 492 (emphasis added), must be considered by the ICC under Section 20a.

Similarly, contrary to petitioner's contentions, this Court in *Schwabacher, supra,* was as much concerned with Section 20a as with Section 5. There, this Court stated, concerning the questions before it:

> "It is contended that the Commission should not remit the dissenting stockholders to remedies in state courts as the Commission would thereby decline the jurisdiction conferred by Section 5 and Section 20a of the Act." 334 U. S. at 188.

In sustaining such contention, this Court referred to the ICC's determination and again equated the scope of inquiry in regard to the issuance of securities under Section 5 and Section 20a in the following language:

"The Commission, as we have seen, has found that the liabilities asserted by appellant, if settled by litigation or negotiation, will not impair the carrier's ability to perform its service, but it has not found the assumption of such liabilities to be compatible with the public interest under §5 and §20a. Indeed, since these claims exceed what the Commission has found to be just and reasonable, it could hardly find that assumption of such claims would be compatible." *Id.* at 197.

Footnote 15 to this Court's decision in *Schwabacher* (at page 195) reads in part as follows:

"Repeated recommendations of the Commission that the federal government occupy the field of regulation of railroad security issues and assumption of obligations were followed in 1920 by addition of §20a to the Interstate Commerce Act (§439 of the Transportation Act of 1920, 41 Stat. 494).

"As early as 1907 the Commission has stated that 'the time has come when some reasonable regulation should be imposed upon the issuance of securities by railways engaged in interstate commerce.' 12 I.C.C. 277, 306. This recommendation was renewed in the Commission's annual report for 1907, p. 24 and in every succeeding annual report up to and including 1919. The Commission incorporated in the 1919 report the statement concerning recommended legislation it had submitted to the Senate Interstate Commerce Committee, which included a recommendation for regulation of security issues.

"House Report No. 456, 66th Cong., 1st Sess. (November 10, 1919), said with respect to the section which later became §20a: '* * * The enactment of the pending bill *will put the control over stock and bond issues exclusively in the hands of the Federal Government* and will result in uniformity and greater promptness of action.'

> "Section 20a as enacted in 1920 remained unchanged by the Transportation Act of 1940. * * *" (Emphasis added.)

Thus, petitioner can find no solace in the *Schwabacher* case to support the dichotomy, of her own creation, regarding Section 20a and Section 5; her attempt to dismiss that case and the *Denver* case as being merger cases (Petition, 13) does not hold up under analysis, and it is clear that petitioner's attempt at separating Section 5 and Section 20a is without merit.

Petitioner places great reliance on *Otis & Co.* v. *Pennsylvania R.R.*, 61 F. Supp. 905 (E.D. Pa. 1945), *aff'd* 155 F.2d 522 (3d Cir. 1946).

As stated by the District Court in the case at bar:

> "Nor does *Otis & Co.* v. *Pennsylvania R.R.*, * * * relied upon by plaintiff dictate a contrary result. While it is true that in that case Judge Kalodner concluded that a Federal District Court might, under certain circumstances, properly have jurisdiction to determine the private rights of stockholders which the ICC cannot determine, he clearly envisioned a situation where, unlike the instant case, the liability sought to be imposed was against a group of directors for breach of their fiduciary duties. Furthermore, again unlike the present suit, *Otis* involved the issuance of railroad securities in a non-merger context and is thus, inapposite in a situation where the securities in question are an indispensable by-product of a railroad merger." 276 F. Supp. at 554.

The Court of Appeals stated that "the District Court was entirely correct in concluding that *Otis* * * * was inapposite and did not govern this case. * * *" (App. 7a)

*Otis* involved a motion for summary judgment, which the court there decided in favor of the defendant directors on the basis that even though the transaction may not have been the best one possible, the board of directors properly exercised their business judgment and were in no way negligent. The only principle for which *Otis* has ever been cited is the business judgment rule.

Unlike *Otis,* the case at bar, as we have shown, involves an assault on two orders of the ICC.

The consequence of adjudication by the District Court in favor of petitioner would have been a complete rearrangement of the plan for stock-debenture exchange approved by the ICC. Damages could have been established only by having the District Court substitute its judgment for that of the ICC as to what was the proper exchange ratio. A judgment that Pennsylvania must pay damages to N&W amounting to the difference between the ratio set by the ICC and a ratio found proper by the Court would have constituted for all practical purposes a reversal of the ICC order.

Petitioner also cites *Pittsburgh & West Virginia Ry.* v. *United States,* 281 U.S. 479 (1930), in support of her position. There, the complainant was a railroad that owned a minority stock interest in another railroad that had obtained ICC approval to abandon a passenger terminal and became a lessee in a joint passenger terminal to be established in Cleveland, Ohio. This Court held that the complainant lacked standing to challenge the ICC order "in the absence of resulting actual or threatened injury to

it." (*Id.* at 486) It also stated that allegations aimed at the actions of the directors of the railroad were "not properly joined in this suit." (*Id.* at 488) The factual differences between that case and the one at bar are obvious, and to the extent that petitioner finds in that case support for the proposition that a single Judge District Court has jurisdiction to modify an ICC order, she errs. Petitioner similarly errs in her reference to *New York Central Securities Co.* v. *United States,* 287 U. S. 12 (1932). While the language of those decisions may be ambiguous, they can not be read to confer such jurisdiction upon a single Judge District Court and still remain consistent with the Interstate Commerce Act and the cases decided thereunder, *Schwabacher, Denver* and others; even *Otis* did not suggest such a result.

Finally, petitioner's attempt to support her fragmentation of the Interstate Commerce Act by citing *County of Marin* v. *United States,* 356 U. S. 412 (1948) merely underlines the necessity for recognizing the obvious relationship between the Merger and Securities decisions.

In *Marin* a motor carrier was attempting to spin off one of its lines in order to reduce local taxation of it. Petitioner in the case at bar argues that the Securities decision is the same thing, and because this Court in *Marin* said the situation there was not a merger and that, accordingly, the ICC did not have jurisdiction under Section 5, the same finding should prevail in the case at bar.

In addition to the fact that the *Denver* and *Schwabacher* cases show that Section 20a jurisdiction is sufficient to permit the ICC to review the points raised by the petitioner

(Section 20a was not involved in *Marin*), the situations in *Marin* and the case at bar are so different that it would require a flight from reality to equate them. That is exactly what petitioner is suggesting: this Court should ignore the fact that the Securities decision flowed from the Merger decision and, in fact, ignore the existence of that Merger decision, and apply a rule of law enunciated in a motor carrier spin-off case where Section 20a was not even involved. It is submitted that the mere statement of such a proposition demolishes it.

## POINT II

**The decision of the Court of Appeals does not conflict with the Fifth Amendment to the Constitution.**

Petitioner attempts to fashion a Constitutional question to justify review by this Court by stating that "the carrier's stockholder's * * * were not given notice of the hearing of the proposed securities issuance." (Petition, 2).

Section 20a(6) confers discretion on the ICC as to whether it shall hold a hearing on an application to issue securities and that a hearing is not statutorily required on such an application has been recognized by the courts, including this one. See *e.g., Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151, 175 (1957); *Chicago South Shore & South Bend R.R.* v. *United States,* 221 F. Supp. 106, 110 (N.D.Ind. 1963); *Walker* v. *United States,* 208 F. Supp. 388, 394 (W.D. Tex. 1962), *aff'd,* 372 U.S. 526 (1963).

Since a hearing is not statutorily required in an ICC proceeding, the Administrative Procedure Act, is inap-

plicable. *A. L. Root Transportation, Inc.* v. *United States,* 280 F. Supp. 152, 157 (D. Vt. 1968); see *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950).

The cases cited by petitioner are clearly inapposite to the case at bar. They set forth the procedures for satisfying constitutional requirements where hearings are either compulsory or are actually held regardless of whether they were required, and there is nothing in the Securities decision about a hearing for the simple reason that a hearing was neither required nor held.

In *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292 (1937) (Petition, 16, 17), the Public Utilities Commission of Ohio revised the petitioner's rates. In so doing the Commission ignored the evidence submitted to it and relied instead on what this Court described as a secret search of its own, the nature of which was not revealed. This Court pointed out that the petitioner there had no notice that the Commission would proceed in that manner, and that therefore it had no real opportunity to argue its case and accordingly held such hearing did not satisfy due process requirements.

Thus, the question raised by *Ohio Bell* was whether the practices and procedures followed in a particular hearing were constitutional, and that distinction applies equally to all of the cases cited by this Court in the passage from *Ohio Bell* quoted on page 17 of the Petition. The courts in those cases did not consider the question of whether in all administrative determinations a person is entitled to a hearing, but rather considered the question of whether a particular hearing was fair.

Another important distinction between *Ohio Bell* and the cases cited therein and the instant case is that in those cases the person complaining of the denial of due process was a party and the very subject of the administrative proceedings. In the case at bar, the N&W, not the petitioner, was the party to the administrative proceeding.

The same distinctions are present in the four cases cited by petitioner on page 17 of her petition as being in accord with *Ohio Bell.*

In any event, as pointed out by both the District Court (276 F. Supp. at 554) and the Court of Appeals (396 F.2d at 77, n.4) petitioner and all other N&W stockholders were given notice of N&W's application to the ICC. While petitioner struggles to minimize the extent of the information furnished, it is clear that the proxy statements set forth all of the material terms of the transaction and the necessity for application to the ICC (16a18a, 19a). While, as also pointed out by both the District Court (*ibid.*) and the Court of Appeals (*ibid.*), the petitioner could have intervened in the ICC proceeding, and could have requested a hearing, she chose to ignore the notices and do nothing. See generally, *United States* v. *Illinois Central R.R.,* 291 U.S. 457, 460-464, 465 (1934); *Chicago South Shore & South Bend R.R.,* 221 F. Supp. 106, 100 (N.D.Ind. 1963).

As stated in *Oscar Gruss & Sons* v. *United States,* 261 F. Supp. 386 (S.D.N.Y. 1966), *vacated on other grounds,* 386 U.S. 776 (1967):

> "There is indeed authority * * * that an administrative agency may consider a stockholder as speaking on behalf of a corporation if it finds that the corpora-

tion has been prevented from doing so by another stockholder's abuse of power." 261 F. Supp. at 393.

A mere reading of the notices received by petitioner (16a-18a, 19a) refutes their characterization as "oblique, casual and uninformative" (Petition, 18); the tortured reasoning involving petitioner's "hypothetically sophisticated reader of proxy statements" (Petition, 15-16) falls of its own weight. Any complaint that petitioner had with the transaction could and should have been raised in the ICC proceeding. She chose to do absolutely nothing in that proper forum and that decision does not confer jurisdiction on a single Judge District Court to substitute its judgment for the judgment of the ICC to vary or modify the terms of one of its orders. Two courts have agreed with that conclusion, and it is submitted that neither the record nor the applicable law justifies further review.

## Conclusion

**Petitioner has not advanced any justification for granting the writ and certiorari should be denied.**

Respectfully submitted,

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